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No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK, ET AL.

Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the State of New York and officials of that State were liable under the Equal Protection Clause and the Equal Educational Opportunities Act for school segregation in the City of Yonkers where the District Court found—and it is undisputed in this Court—that the State and its officers "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated" and that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials."

2. Whether the Second Circuit correctly held, as every other federal court to consider the issue has done, that the Equal Educational Opportunities Act abrogates a State's Eleventh Amendment immunity from suit in federal court.

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BRIEF IN OPPOSITION

Respondent the Yonkers Board of Education respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

The petition for writ of certiorari is the latest effort of the State of New York and various state-related entities and officials to avoid their responsibility for assisting in the completion of the desegregation remedy in the Yonkers public schools. The petition arises, however, in the context of critical factual findings either wholly unchallenged on appeal or affirmed by the court of appeals on the basis of "ample support" in the evidence.

Those factual findings—many of which the petitioners essentially ignore—demonstrate the petitioners' responsibility for the continuing effects of the former dual school system in Yonkers and establish the correctness of the Second Circuit's decision.

More importantly for purposes of considering the petition, nothing in petitioners' submission even comes close to establishing that this case warrants plenary review by this Court. Far from creating a conflict with decisions in other circuits, the decision of the Second Circuit applied settled law articulated by this Court and by other circuits to the largely undisputed facts of this case. Essentially admitting as much, petitioners are left at one point to suggest that the unanimity in the circuits against their position should compel this Court to act. *See* Pet. 24. This contention, of course, serves only to highlight that none of the traditional factors motivating this Court to exercise its discretionary review are present here. The petition should be denied.

COUNTERSTATEMENT

This school desegregation case was initiated in 1980 by the United States (later joined by the NAACP) against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. In 1985, the district court found, *inter alia*, that the City and the Yonkers Board had unlawfully segregated the public schools in Yonkers, in violation of the Fourteenth Amendment. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In affirming that decision, the Second Circuit recognized that "race-based decisions" had contributed to school segregation and inequalities in Yonkers in a number of areas, including: (i) the special education program; (ii) the vocational education program; (iii) the quality of school facilities and programs generally; and (iv) school staffing. 837 F.2d at 1195-1208, 1226-33.

The Second Circuit also affirmed the district court's finding that, in Yonkers, there was an "interrelationship" between the unlawful segregation of schools and unlawful segregation of subsidized housing as a result of site selection decisions that concentrated subsidized housing in Southwest Yonkers, where schools had disproportionately minority enrollments, and maintained the "all-white" character of other areas and schools in the City. *Id.* at 1185-94, 1208-09, 1214-15.

In 1986, the district court approved a school desegregation remedy, 635 F. Supp. 1538, which effectively ended the segregation of students among school facilities in Yonkers. The district judge specifically has found that, "[a]s a result of the good faith and zealous implementation by the Yonkers Board of Education and its staff of this Court's initial School Remedy Order of May 13, 1986 (Educational Improvement Plan ("EIP") I)," the Yonkers Board "achieved desegregation of enrollments among the schools" in "less than a year of the issuance of EIP I." 833 F. Supp. 214, 216 (1993).

The plaintiffs, however, soon concluded that EIP I, while effective in ending overt segregation among schools, was not and would not be effective in eliminating to the extent practicable inequalities in the educational program, in-school segregation, and other vestiges of the unlawful dual school system, or in supporting effective desegregation of schools in Yonkers pending implementation of the housing remedy. The plaintiffs filed motions to add the State defendants as parties to the case, and the Yonkers Board sought leave to file a cross-claim.[1] The proposed pleadings alleged that the State

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[1] The State defendants included the State itself, the State Education Department ("SED"), the State Urban Development Corporation ("UDC"), and the Board of Regents, which are collectively referred to as "the State institutional defendants." Also included were the individual Regents of the Board of Regents, the Commissioner of Education, and the Director of the UDC (collectively "the State officials").

had contributed to unlawful segregation in Yonkers and therefore could be held liable and required to participate in the additional remedial measures needed to complete the process of making the Yonkers public schools a unitary system.

After substantial delays caused in large measure by the State,[2] the district court granted the motions to add the State defendants and conducted a three-week trial addressed to the issue whether there continue to exist

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[2] On November 5, 1987, at the insistence of the State, the district court decided to hold the plaintiffs' motions in abeyance while the Yonkers Board developed a written plan of additional remedial measures and sought consensual resolution on funding for those measures. The Yonkers Board developed a detailed remedial plan that proposed specific measures tailored to address the practices and conditions that had been identified as vestiges of unlawful segregation. On January 19, 1989, after plaintiffs had spent more than a year unsuccessfully attempting to obtain State assistance with that plan, the district court granted plaintiffs' motions and added the State defendants as parties.

Further delay attributable to the State also resulted when the State—on three separate occasions—sought interlocutory review of decisions by the district court. In each case the Second Circuit dismissed the appeals. *See United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498 (2d Cir. 1990); *United States* v. *Yonkers Bd. of Educ.*, 990 F.2d 623 (2d Cir. 1993) (table); *United States* v. *Yonkers Bd. of Educ.*, No. 94-6052 (2d Cir. Mar. 2, 1994) (unpublished order of dismissal).

The State's foot-dragging also affected the district court's fact-finding process. In response to a request from the district court, the State initially agreed to identify any findings in the 1985 decision by which it refused to be bound. The State later requested, and the district court directed, that the Yonkers Board prepare specific Requests for Admission (RFAs) under Fed. R. Civ. P. 36, to determine whether the State disputed any of those findings. The State agreed to respond to such RFAs in a "reasonable" manner. When the State later refused to respond to those RFAs within the extended time set by the court, the district court directed that all of the RFAs be deemed admitted, subject to the State's right to withdraw any admission upon a proffer of grounds for reopening a finding from the 1985 decision. The State never sought to withdraw any admissions.

"vestiges of segregation in the Yonkers school system" not "adequately addressed" by EIP I. The district court defined "[a] vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," 833 F. Supp. at 218-219, consistent with this Court's holdings in *United States* v. *Fordice*, 505 U.S. 717 (1992), and *Freeman* v. *Pitts*, 503 U.S. 467 (1992). Using this definition, the district court found that "vestiges of segregation remain in the Yonkers Public School system" and that the EIP I desegregation remedy was "inadequate to eradicate vestiges of segregation 'root and branch' and must be expanded." 833 F. Supp. at 225. The district judge specifically stated: "We find that although minority students in Yonkers attend school in the same buildings as majority students, they are undergoing different educational experiences." *Id.* That decision was not at issue in the Second Circuit (*see* Pet. App. 7a) and is not presented here. Thus, for purposes of the petition, it is a given that the vestiges of the racially dual school system continue to exist in Yonkers.

In 1994, the district court conducted a six-week trial on whether the State was liable for unlawful school segregation and its vestiges in Yonkers as of the time of the district court's 1985 decision. In support of their case, plaintiffs presented testimony from over thirty witnesses as well as over 2,000 exhibits. The district court received testimony from members and former members of the Board of Regents, a former State Commissioner of Education and a former Deputy Commissioner, key officials from the SED, the former head of the UDC, and UDC officials who were responsible for its subsidized housing in Yonkers. The court also received testimony from Yonkers officials and community leaders who interacted with the State on school and housing issues.

The district court made extensive factual findings, which were either unchallenged or affirmed on appeal. These included findings that:

- " '[T]he State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*.' " Pet. App. 9a-10a (quoting *id.* at 67a).
- The State " 'possessed the full means and authority to deal with Yonkers school segregation, had it been inclined to do so.' " *Id.* at 10a (quoting *id.* at 116a). *See also id.* at 73a ("the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so").
- Rather than using that authority, "the State defendants did nothing to remedy school segregation in Yonkers, using none of their power and authority toward that end." *Id.* at 11a. "Rather than act, the State waited." *Id.* at 73a.
- To the extent it did act, moreover, "the State took certain actions that had the effect of *encouraging* that segregation." *Id.* at 12a (emphasis added).
- "[T]he *reasons* for the State defendants' actions and inactions * * * were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." *Id.* at 13a (emphasis added). *See also id.* at 76a (State's "determined reluctance" to address racial segregation in Yonkers was because "race-based political opposition to integration throughout New York State eventually exerted enough pressure on [State education] officials to cause them to become cautious and reactive on the issue of desegregation"). The pressures to which State

officials responded, the lower courts found, "can only be explained in racial terms." *Id.* at 15a, 116a.

- The State's "race-based" conduct had the effect of perpetuating unlawful segregation in Yonkers in both "obvious" and "more subtle, but equally real" ways. *Id.* at 80a. "The most obvious way was that 'Yonkers was not forced to desegregate its schools.' " *Id.* at 15a (quoting *id.* at 80a).
- Like the State itself, the New York State Urban Development Corporation ("UDC")—"perhaps the most powerful state housing and development agency ever created," *id.* at 82a—"had the power to take steps to alleviate" the unlawful segregation in Yonkers but "failed to do so, and instead worsened segregation by knowingly bowing to political pressure it knew to be race-based." *Id.* at 17a.

Despite these findings, the district court concluded "with reluctance," *id.* at 116a, that there was insufficient evidence to find the State officials liable under 42 U.S.C. § 1983. For this conclusion, it relied solely on its resolution of the "close and difficult question," Pet. App. 98a, of interpretation of the Second Circuit's decision in *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *See* Pet. App. 93a-99a; 112a-115a. It also found that the claims against UDC and its officials were time-barred. *Id.* at 110a-112a. In a separate opinion, the district court declined to hold the State institutional defendants liable pursuant to the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1701 *et seq.*, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See* Pet. App. 118a-137a.

On respondents' appeal, the State challenged "only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*." Pet. App. 34a. After

reviewing the evidence, the Second Circuit held that it "amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." *Id.* at 37a. The Second Circuit also found based on a review of the evidence that the district court's other factual findings—essentially not challenged by the State defendants—were "amply supported." *Id.* at 40a.

On the strength of the district court's factual findings, the Second Circuit unanimously reversed the district court's admittedly "reluctan[t]" conclusion, *id.* at 116a, that the State defendants could not be held liable. After reviewing "fundamental principles governing equal protection claims," *id.* at 26a; *see id.* at 26a-31a, the court found that "[t]hese principles govern the present case," because the district court "found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *Id.* at 31a-32a. The Second Circuit also stated that the record left "no doubt" that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 44a.

The "amply supported factual findings," the Second Circuit held, "distinguish the present case from *Arthur* v. *Nyquist,*" the Second Circuit case on which the district court had based its decision. *Id.* at 40a. In that case, there was evidence that the state officials "made substantial, repeated efforts" to require local officials in

Buffalo to develop and implement a desegregation plan and that "the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated." *Id.* at 41a. The court found the evidence "materially different" with respect to Yonkers, *id.*, and held that the State officials were liable under 42 U.S.C. § 1983.

The Second Circuit further held that the EEOA abrogated the Eleventh Amendment immunity of the State institutional defendants, expressly endorsing the conclusion of the Seventh Circuit in *Gomez* v. *Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987). Pet. App. 46a. *See also Los Angeles Branch NAACP* v. *Los Angeles Unified Sch. Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). On the merits of the EEOA claims, the court found the district court's rejection of the claims infected with its misunderstanding of the Second Circuit's *Arthur* decision, and, therefore held that "[p]laintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld." Pet. App. 50a. For this conclusion, it relied on the Sixth Circuit's decision in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).[3]

Finally, the court of appeals found that the district court's rejection of plaintiffs' claims with respect to the State's segregative housing conduct and its continuing effects on Yonkers schools also was affected by the district court's misapplication of *Arthur*, and ordered the court to reconsider its dismissal of those claims on remand. Pet. App. 51a-54a.

The Second Circuit therefore remanded the matter to the district court for proceedings not inconsistent with its

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[3] The court's conclusions with respect to section 1983 and the EEOA made it unnecessary for the court also to consider liability under Title VI. *See* Pet. App. 51a.

opinion. Those still-pending proceedings will include determination of whether the housing-related claims go forward and determination of appropriate remedies as to all claims against the State defendants.

REASONS FOR DENYING THE WRIT

In this case, the District Court found that the State and its officers "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." Pet. App. 31a-32a. The District Court also found that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 44a. On the strength of these findings—for which the Second Circuit found "ample support" in the record, *id.* at 37a, and which the State barely challenged in court below, *see id.* at 34a, and does not challenge at all in this Court—the Second Circuit held that the State and its officers were liable under the EEOA and section 1983, respectively, for the vestiges of segregation in the Yonkers school system. This holding does not warrant review by this Court as it is fact-bound, turns largely upon an interpretation of state law, conflicts with no decision of any other court of appeals, and, in addition, is legally correct.

I. THE HOLDING OF THE COURT BELOW—THAT THE STATE OFFICIALS WERE LIABLE UNDER 42 U.S.C. § 1983 FOR CAPITULATING TO RACIAL PRESSURES IN DEROGATION OF THEIR DUTY TO ENSURE DESEGREGATION IN YONKERS—DOES NOT WARRANT REVIEW

1. The State argues that the State officials cannot be liable under section 1983 because they were not the cause of the segregation in Yonkers. *See* Pet. 11-17. Before this Court, the State contends that its officials had no "responsibility" to remedy segregation in Yonkers and whatever remedial power they did have was merely "discretionary." *Id.* at 14, 11. On this view of the case, the State posits a conflict between the decision below and *Reid* v. *Kayye*, 885 F.2d 129 (4th Cir. 1989), and "[a] case very similar to" it (*id.* at 132)—*Bush* v. *Viterna*, 795 F.2d 1203 (5th Cir. 1986). *See* Pet. 16.

The conflict between *Reid* and *Bush* and the decision below is wholly illusory. In those cases, unlike this one, the state officers lacked any responsibility under state law to redress the constitutional violations at issue. Here, by contrast, the State officials had a duty arising under New York law to prevent and correct—rather than knowingly tolerate and encourage—the *de jure* segregation in Yonkers. Not only is there no conflict between *Reid* and *Bush* and the decision of the Second Circuit to hold the State officials liable, but a contrary holding by the court below might well have conflicted with *Penick* v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), another school desegregation case in which state officials were held liable.

The plaintiffs in both *Reid* and *Bush* attempted to hold state officials liable under section 1983 for allegedly unconstitutional conditions at county jails. In each case, the attempt was rejected on the ground that, while the state officials may have had *authority* under state law to make recommendations or take some corrective action

with respect to the conditions of which plaintiffs complained, they had no state law-imposed *duty* or *responsibility* to do so. *See Reid*, 885 F.2d at 131 ("Because, in the case at bar, appellees had no duty to remedy the challenged jail conditions, their inactions cannot be seen as a cause of those conditions and a § 1983 suit cannot be maintained against them. * * * The *Bush* court examined Texas law and held that a § 1983 suit could not be maintained because the [state defendant] had no legal duty to enforce applicable jail standards."). Both courts recognized, however, that a state official can be held to have "caused" for section 1983 purposes a violation of federal right on a supervisory liability theory. *See id.* at 131-132;[4] *Bush*, 795 F.2d at 1206, 1208.

Apart from the fact that this case arises in a markedly different context than either *Reid* or *Bush*, there is no conflict between the decision below and those decisions because here the Second Circuit determined that the State officials *did* have both power *and* responsibility to take action in response to the unconstitutional acts and conditions that they knew were occurring in Yonkers. The State argued in the court below that "the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation." Pet. App. 42a. The Second Circuit, however, concluded that "this contention need not detain us long" in light of "express provisions of New York statutory law" which specifically direct that state officials "shall enforce" all laws relating to education and are charged with the "duty" to take necessary steps to

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[4] "It is true that, while the doctrine of *respondeat superior* cannot be invoked in § 1983 cases, supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates. Liability in those circumstances is not premised on *respondeat superior* but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries." *Reid*, 885 F.2d at 131-132 (citation omitted).

that end. *Id.* at 43a. Pointing to various provisions of the New York Education law (and also to several New York state cases), *see id.* at 42a-43a, the Second Circuit stated: "Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless." *Id.* at 44a.[5]

Clearly, the Second Circuit's understanding of the responsibilities imposed on the State officials under New York law is an issue of state law that does not merit this Court's attention. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); *see also County Ct. of Ulster County* v. *Allen*, 442 U.S. 140, 153-154 (1979) (the Second Circuit's "experience with New York practice is entitled to respect"). The State argues that the Second Circuit interpreted New York law incorrectly, *see* Pet. 14-16, but this Court, quite properly, "usually is reluctant to grant review of cases turning on state statutes or constitutions." Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.10, at 183 (7th

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[5] The record below also contains extensive evidence—in the form of admissions both by state officials and in state policy statements and reports—that the State consistently has conceded that it has a duty to prevent and remedy unlawful school segregation. *See, e.g.*, Trial Exhibit 3-7 (1968 Policy Statement of State Board of Regents: "Where a district fails or refuses to act [to prevent or remedy school segregation], then the responsibility for corrective action is clearly and inescapably that of the State"). The record further contains extensive evidence as well as district court findings confirming that, with respect to issues other than school segregation and desegregation, the State not only has acknowledged but also has vigorously discharged its duty to supervise the schools and to take corrective action as necessary to ensure full compliance by Yonkers officials with federal and state law and policy. *See, e.g.*, Pet. App. 72a (finding that New York State Education Department "is one of the most activist state educational bodies in the country").

ed. 1993). Whether the Second Circuit was right or wrong about the requirements of New York law, its decision is easily reconcilable with *Reid* and *Bush*.

Furthermore, even if the State had no duty under New York law to prevent the establishment and maintenance of an unlawful dual school system in Yonkers, but only had—as the State concedes—discretionary authority to do so, its failure to exercise that authority *because of* illegitimate racial reasons is sufficient to impose liability. *See DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although Due Process Clause does not require a State to provide protective services, failure to do so for discriminatory reasons violates Equal Protection Clause) (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)); *see also DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) (under *DeShaney* footnote 3, state "inaction" violates equal protection if it is "the product of invidious discrimination"). In neither *Reid* nor *Bush* was there an allegation that state officials failed to act for racially invidious reasons. *Compare* Pet. App. 31a-32a (the State officials "had the power to take steps to remedy [the segregation in Yonkers], and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated").

As the State acknowledges, *see* Pet. 16, this case is like *Penick*, in which state education officials, including the state board of education, were found liable for segregation in Ohio. Much like the New York state defendants in this case, the Ohio state board was found liable for "adopt[ing] a 'hands-off, let someone else do it' approach" to school desegregation. 663 F.2d at 27. As the Sixth Circuit further explained:

> [T]he Board operated with a few narrow exceptions according to a 'hands-off' policy in the area of school desegregation. Rather than using its supervisory powers to inquire into the possibility of law violations and its pursestrings to enforce compliance

> with the law, the Board developed policies and practices which effectively disabled it from acting at all in this area, thereby avoiding its obligation in the first instance to ferret out constitutional violations with the foreseeable result of maintaining and condoning constitutional violations by local boards.
>
> * * *
>
> The Court concludes that although there were available procedures for the discovery of unlawful segregation in Ohio, and the Board had the authority to remedy it, there was great reluctance to self-initiate any inquiry, and even more reluctance to exercise its power by withholding funding or using other available means as sanctions for a local district's maintenance of unconstitutional racial segregation. [*Id.* at 26].

Like the court below, the Sixth Circuit in *Penick* saw no conflict between its decision and the Second Circuit's decision in *Arthur*. *See id.* at 30. Thus, far from creating an intercircuit conflict, the court below likely *avoided* conflict by distinguishing *Arthur* and following *Penick*. The State does not argue that the court below erred in distinguishing *Arthur* and, in any event, any intracircuit conflict between the decision below and *Arthur* is a matter for the Second Circuit to resolve in the first instance. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). No judge on the Second Circuit requested that a vote be taken on whether to rehear the case *in banc*. Pet. App. 139a.

The fact that *Arthur* remains the law in the Second Circuit also belies the State's claim that the decision of the court below represents "an expansion of civil rights liability beyond what this Court has established." Pet. 11. *Arthur* rejected the notion that the State court be held liable on a respondeat superior theory, *see* 573 F.2d at 146 ("[W]e do not believe that the appellee's theory of derivative or indirect liability can be sustained") (citing

Rizzo v. *Goode*, 423 U.S. 362 (1976)), and also refused to impose liability simply because "it would have been possible for the state appellants to have intervened more forcefully in [the Buffalo desegregation] matter." 573 F.2d at 146. That remains the law in the Second Circuit after the decision below.

2. In light of the Second Circuit's determination that, under New York law, the State defendants had the legal "responsibility to intervene in Yonkers to remedy the unlawful segregation," Pet. App. 42a, there is no merit to the State's argument that the "failure of the state officials to play a sufficient remedial role," Pet. 17, could not be the "cause" of the constitutional violation for section 1983 purposes. It is well established in this Court's cases that section 1983 liability may be imposed on those who have a duty to act but fail to do so, *see, e.g.*, *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989) (inadequate police training gives rise to section 1983 liability for municipality where the "failure to train amounts to deliberate indifference"), and on those who are responsible for the constitutional violations of others under their charge, *see, e.g.*, *Board of the County Comm'rs of Bryan County* v. *Brown*, 117 S. Ct. 1382, 1389 (1997) (recognizing that a municipality is liable under section 1983 even absent "an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights" if it is the "moving force" behind the deprivation).

Furthermore, the record in this case establishes that the State officials not only failed to act to remedy the segregation in Yonkers but took actions that helped perpetuate the unlawful segregation. *See* Pet. App. 12a ("In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); *id.* at 12a-13a ("[T]he Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation"); *id.* at 13a (referring to "the State defendants'

actions and inactions"); *id* at 15a ("The district court found that the State's acts and omissions 'impacted the City in several ways' "); *id.* at 41a ("[T]he State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); *id.* at 44a ("[T]he State defendants * * * took actions that encouraged the perpetuation of segregation").

3. The State also argues that its officials lacked the requisite discriminatory intent to commit a violation of the Equal Protection Clause. *See* Pet. 17-19. The State contends that the Second Circuit made an improper "legal leap" in finding such an intent in the State's failure to act. *Id.* at 19. The State identifies no court of appeals decision in conflict with the court below on this point and its argument is without merit.

The Second Circuit specifically recognized in this case that, to establish an equal protection violation, a plaintiff must "show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." Pet. App. 26a (citing *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973)). The Second Circuit determined that the findings made by the District Court established such an intent on the part of the State defendants as "the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power *because they were capitulating to political pressures that they knew were racially motivated*." Pet. App. 31a-32a (second emphasis added). Indeed, as the Second Circuit recognized, the principles relied upon to find discriminatory intent and an equal protection violation by the State were precisely the same principles relied on by that court in affirming the liability of the

Yonkers Board of Education in 1987. *See id.* at 28a-31a.

Finding discriminatory intent in such circumstances falls squarely within this Court's previous articulation of equal protection principles: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (quoting *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting). *Accord City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

Finally, in light of the above, the "fundamental principles of federalism," Pet. 19, that the State invokes cannot excuse it from liability for violating the Equal Protection Clause since the Fourteenth Amendment acts as an express limitation upon state sovereignty.[6]

II. THE HOLDING OF THE COURT BELOW THAT THE STATE INSTITUTIONAL DEFENDANTS WERE LIABLE UNDER THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS AND DOES NOT WARRANT REVIEW.

The Second Circuit held that, based upon the same factual findings supporting the liability of the State officials under section 1983, the State institutional defendants were liable under the EEOA. *See* Pet. App.

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[6] In the court below, respondents argued that the State officials were liable under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. *See* Respondents' C.A. Br. 48-57. Title VI therefore provides an additional legal basis on which the judgment against the State officials can be defended.

45a-50a.[7] The State contends that the Second Circuit erred in holding (1) that in the EEOA Congress abrogated the States' Eleventh Amendment immunity from suit in federal court, *see* Pet. 21-24, and (2) that the State institutional defendants were liable under the EEOA. *See id.* at 24-28. Neither contention merits review.

1. As the State points out, the Seventh and Ninth Circuits agree with the Second Circuit's conclusion that the EEOA abrogates a State's Eleventh Amendment immunity. *See* Pet. 24 (citing *Gomez*, 811 F.2d at 1037 ("Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the [EEOA]"), and *Los Angeles Branch NAACP*, 714 F.2d at 950 ("Congress abrogated California's immunity from suit in desegregation cases by enacting [the EEOA]").[8] With admirable (but misguided) pluck, the State argues that the unanimity of the Second, Seventh, and Ninth Circuits is itself a reason "why certiorari is warranted in this case." Pet. 24. This Court's usual practice, however, is to step into a legal fray only when the circuit courts are at odds. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").[9]

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[7] The Second Circuit recognized that the Eleventh Amendment barred the imposition of liability against the State institutional defendants pursuant to section 1983. *See* Pet. App. 45a (citing *inter alia Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

[8] *Accord Stanley* v. *Darlington County Sch. Bd.*, 879 F. Supp. 1341, 1363-67 (D.S.C. 1995), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Board of Pub. Educ. for Savannah* v. *Georgia*, No. CV 490-101, 1990 WL 608208, at *6 (S.D. Ga. Sept. 24, 1990) ("*Savannah Board*").

[9] The State implies that *Gomez* and *Los Angeles Branch NAACP* are somehow flawed because they were "decided before this Court's most recent pronouncements" on the Eleventh Amendment. Pet. 24. But in 1985—two years before *Gomez* was

That the EEOA abrogates state sovereign immunity is not only the unanimous view of the courts of appeals, it is the legally correct view. "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' " *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1123 (1996) (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991)). The language of the EEOA—specifically, 20 U.S.C. §§ 1703 and 1706—meets this standard. *See Gomez*, 811 F.2d at 1037 (concluding, based upon sections 1703 and 1706, that it is "clear" that the EEOA abrogates state sovereign immunity); *Los Angeles Branch NAACP*, 714 F.2d at 951 (EEOA "clearly" abrogates Eleventh Amendment); *Stanley* v. *Darlington County Sch. Bd.*, 879 F. Supp. 1341, 1365 (D.S.C. 1995) ("The EEOA clearly manifests Congress' intent to abrogate Eleventh Amendment immunity for suits brought under the EEOA"), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Savannah Board*, 1990 WL 608208, at *6 ("Congress' intention to abrogate the states' immunity is clearly expressed in the text of the [EEOA]").[10]

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decided—this Court could say that the requirements for Eleventh Amendment abrogation were already "well established in our cases." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Although *Dellmuth* v. *Muth*, 491 U.S. 223 (1989)—the only recent case other than *Atascadero* on which the State relies heavily—was decided after *Gomez*, both *Stanley* and *Savannah Board* cite *Dellmuth* but hold that the EEOA abrogates Eleventh Amendment immunity. At all events, as shown below, this holding is in no way contrary to *Atascadero* or *Dellmuth*.

[10] The State does not dispute that the EEOA was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe*, 116 S. Ct. at 1125. In any event, "[t]here can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment." *Gomez*, 811 F.2d at 1037. Section 5, of course, grants Congress abrogation power. *See Seminole Tribe*, 116 S. Ct. at 1125; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976).

Section 1703 provides: "No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system" (emphasis added). Creating a judicial remedy for this State-targeted command, section 1706 then provides that "[a]n individual denied an equal educational opportunity * * * may institute a civil action in an appropriate district court of the United States *against such parties*, and for such relief, *as may be appropriate*" (emphasis added). The combined effect of these provisions is clear: "The 'appropriate parties' against whom such a civil action may be instituted as those upon whom the statutory obligations and prohibitions are imposed—namely, the 'State.' " *Stanley*, 879 F. Supp. at 1366. Thus, "[r]ead together, the text of 20 U.S.C. §§ 1703 and 1706 (1988), is specific enough to indicate clearly Congress' unequivocal intent to abrogate." *Savannah Board*, 1990 WL 608208, at *6.[11]

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court relied upon the language of section 5 of the Fourteenth Amendment—in which "Congress is expressly granted authority to enforce 'by *appropriate* legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority," *id.* at 456 (quoting section 5; emphasis added)—to hold that section 5 permits Congress

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[11] Although Congress' intent to abrogate the Eleventh Amendment must be clearly expressed in statutory text, such a clear expression can be found in text lacking "explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring) (fifth vote for majority opinion). *See also Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989) ("[N]o magic words are required for abrogation"), *overruled on unrelated grounds*, *Seminole Tribe*, 116 S. Ct. at 1124-1132. Here, sections 1703 and 1706 "together convey a message of unmistakable clarity." *Union Gas*, 491 U.S. at 8.

to abrogate the Eleventh Amendment.[12] Since section 1703 cannot be read as anything other than an express limitation on state authority, *compare* § 1703 ("No State shall deny equal educational opportunity to an individual on account of his or her race") *with* U.S. Const., Amend. XIV, § 1 ("No State shall * * * deny to any person within its jurisdiction the equal protection of the laws"), a suit against a State must be deemed a suit against an "appropriate" party under section 1706.[13]

The decision below is not contrary to *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), or *Dellmuth* v. *Muth*, 491 U.S. 223 (1989). In the former, this Court admonished that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246. In the latter, this Court rejected an attempt to distinguish *Atascadero* on the ground that, in addition to a general authorization for suit, the statute at issue also made "frequent reference to the States." 491 U.S. at 232. In neither case, however, was there any provision, comparable to section 1703, which makes unmistakably plain Congress' intent that it is appropriate to bring suit under the EEOA against a State.

The statute at issue in *Atascadero* was the Rehabilitation Act, which at that time afforded relief against "any recipient of Federal assistance." 29 U.S.C. § 794a. The

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[12] The *Fitzpatrick* Court said: "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456.

[13] *Cf. Winbush* v. *Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995) (holding that the provision of Title VII giving courts power to grant any "equitable relief as the court deems *appropriate*," 42 U.S.C. § 2000e-5(g)(1) (emphasis added), abrogates the Eleventh Amendment to allow awards of prejudgment interest on damages against States); *Pegues* v. *Mississippi State Employment Serv.*, 899 F.2d 1449, 1454 (5th Cir. 1990) (same).

Court held that this "general authorization for suit in federal court" was insufficient to abrogate state sovereign immunity because it did not "subject the States to federal jurisdiction * * * specifically." 473 U.S. at 246. Sections 1703 and 1706, however, "do not simply authorize relief against a general, undefined class of defendants that may or may not include the state and its agencies." *Stanley*, 879 F. Supp. at 1366-67 n.16. Rather, section 1706 authorizes suits in federal court against "appropriate" parties and section 1703 "mentions specifically the state," *Savannah Board*, 1990 WL 608208 at *6, and "expressly contemplates that relief is to be obtained from the state." *Gomez*, 811 F.2d at 1038. Thus, there is no conflict between *Atascadero* and the Second Circuit's decision in this case. *See id.* at 1037-38 (distinguishing *Atascadero*); *Stanley*, 879 F. Supp. at 1366 n.16 (same); *Savannah Board*, 1990 WL 608208 at *6 (same).

Nor is the decision below contrary to *Dellmuth*. As in *Atascadero*, the statute at issue in *Dellmuth*—the Education of the Handicapped Act ("EHA")—contained little more than a general authorization for suit in federal court. The Court rejected the attempt of the proponent of abrogation to distinguish *Atascadero* on the ground that "the EHA 'is replete with references to the states,' " 491 U.S. at 232 (quoting the respondent's brief), saying that this created nothing more than "a permissible inference" that the Congress intended for States to be amenable to suit in federal court. *Id.*[14] There is, however, nothing in the EHA akin to section 1703's express injunction against the States and section 1706's authorization of suit against "appropriate" parties—language that collectively creates much more than a mere permissible inference that Congress intended abrogation. Thus,

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[14] *But cf. Seminole Tribe*, 116 S. Ct. at 1124 ("[T]he numerous references to the 'State' in the text of [the Indian Gaming Regulatory Act] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit").

although the Court could say in *Dellmuth* that the EHA did not "address abrogation in even oblique terms" and "in no way intimate[d] that the States' sovereign immunity is abrogated," 491 U.S. at 231, the same certainly cannot be said here.

2. The Second Circuit also held correctly that the State institutional defendants were liable under the EEOA. In the EEOA, Congress declared it to be the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." 20 U.S.C. § 1701(a)(1). As noted above, section 1703 of the EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced [race-based] deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." The EEOA defines the term "educational agency" as a "State education agency" or a "local educational agency." *Id.* at 1720(a). Under the plain language of the EEOA, then, a State denies equal educational opportunity "by" the failure of a local educational agency to eliminate the vestiges of segregation. Therefore, the Second Circuit correctly held that the principles articulated by the Sixth Circuit in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), supported the imposition of "supervisory" liability on the State institutional defendants under the EEOA on the same facts that warranted the imposition of liability on the State officials under the Equal Protection Clause and section 1983. *See* Pet. App. 48a-49a.

The State contends that the Second Circuit concluded that liability under section 1703(b) of the EEOA "is broader than the Fourteenth or Fifth Amendments," Pet. 27, in conflict with *United States* v. *Texas*, 680 F.2d 356 (5th Cir. 1982). In that case, the district court held that Texas had engaged in unlawful segregation of students

in violation of the Fourteenth Amendment and the EEOA, including section 1703(b). The Fifth Circuit reversed, holding that the evidence was insufficient to establish a violation of the Equal Protection Clause or section 1703(b), since the putative EEOA violation "rest[ed] on the same factual premises" as the equal protection violation. 680 F.2d at 371.

There is no conflict between the Fifth Circuit's decision and the decision below. The Fifth Circuit held that certain evidence *insufficient* to establish an equal protection violation was also insufficient to establish an EEOA violation. Here, the Second Circuit held that evidence *sufficient* to establish an equal protection violation also established an EEOA violation. There is no logical inconsistency between these holdings. Moreover, the State is incorrect when it asserts that the Second Circuit held that the EEOA is broader than the Equal Protection Clause. Rather, it stated that "the EEOA provides protections *similar* to those provided by the Equal Protection Clause." Pet. App. 47a (emphasis added). Since the Second Circuit imposed liability under the EEOA based upon the same factual findings for which it imposed liability under the Equal Protection Clause, it is not necessary to the Second Circuit's decision for the EEOA to go beyond the Equal Protection Clause and the judgment below can stand even if that proposition is untrue.

Finally, accepting for purposes of argument that *State of Texas* stands for the proposition that the EEOA is no broader than the Equal Protection Clause, there are other expressions in Fifth Circuit case law to the contrary. *See Castaneda* v. *Pickard*, 648 F.2d 989, 1001 (5th Cir, 1981) (the EEOA "makes unlawful practices, such as segregation of students on the basis of sex, which may not violate the fourteenth amendment"); *United States* v. *Hinds County Sch. Bd.*, 560 F.2d 619, 623 (5th Cir. 1977) (the declaration of policy in 20 U.S.C. § 1702(a)(1) "expressly goes beyond the rights guaran-

teed to school children under the Fourteenth Amendment prior to the EEOA's adoption"). Given the tension in the Fifth Circuit's own cases, even if there were a conflict between the decision below and *United States* v. *Texas* (which there is not), such conflict would not warrant review prior to the Fifth Circuit's clarification of its law. *See Wisniewski* v. *United States*, *supra*.[15]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[15] As with the State officials, *see* note 6, *supra*, the judgment of liability against the State can also be defended on the basis of Title VI. Respondents reserve their right to raise Title VI in support of the judgment below in any future proceedings. The States' Eleventh Amendment immunity is expressly abrogated for Title VI claims. 42 U.S.C. § 2000d-7. *See Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) ("In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975").